SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

----------X

UNIVERSAL LENDING DEPOT, LLC

Plaintiff,

- v -

QUONTIC BANK,

Defendant.

INDEX NO. 654911/2023

MOTION DATE 11/15/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISS.

Plaintiff Universal Lending Depot, LLC is a start-up wholesale and retail mortgage company (ULD or Company). Defendant Quontic Bank (Quontic) is plaintiff's competitor. Plaintiff brings this action against defendant alleging that defendant unlawfully retained plaintiff's three executive employees while these employees were still in plaintiff's employ. Plaintiff seeks damages including punitive damages and to enjoin defendant from poaching plaintiff's employees and from using or disclosing plaintiff's information defendant obtained from these employees. The complaint alleges four causes of action: (1) aiding and abetting the employees' breach of fiduciary duty; (2) interference with contract; (3) employee piracy; and (4) unfair competition. Defendant now moves to dismiss for failure to state a cause of action under CPLR 3211(a)(7). For the following reasons, defendant's motion is granted in part and denied in part.

Background[1]

On September 9, 2022, plaintiff retained James C. Hooper as its president and chief executive officer (NYSCEF # 1, Complaint [Compl], ¶ 21). Hooper entered into an Executive Agreement with plaintiff which obligated Hooper to work and create a new wholesale division, manage the existing retail mortgage operations, perform services consistent with his position, promote plaintiff's interests, serve plaintiff faithfully, and devote his reasonable efforts and substantially all his

[1] Except otherwise stated, the facts in the Background section are drawn from the complaint and accompanying exhibits. The facts are assumed true solely for purposes of this motion to dismiss.

productive time and attention during working hours to the performance of his duties as President (*id.* ¶¶ 22-27). The Executive Agreement also included non-competition, non-solicitation, non-disclosure provisions (*id.* ¶ 27). In consideration, Hooper received a $150,000 signing bonus, base salary of $500,000 per year, and membership interest in the Company (*id.* ¶¶ 29-33).

A few days later, on September 15, 2022, plaintiff adopted an Operating Agreement which granted Hooper a five-percent membership interest in the company (*id.* ¶ 34). The Operating Agreement included a provision for specific performance requiring Hooper to "perform his duties: (i) in good faith, (ii) in a manner he reasonably believes to be in the best interests of the Company, and (iii) with the care that an ordinarily prudent person in a like position would use under similar circumstances"; and it imposed a duty of "utmost good faith and loyalty" to plaintiff and the members (*id.* ¶¶ 35-36). The Operating Agreement also prohibited Hooper from voluntarily withdrawing from the Company (*id.* ¶ 37). Hooper's official start date was September 23, 2022.

Plaintiff employed Marlette Owen as its Director of Credit on September 23, 2022, and Tyler Ermisch as its Director of Sales on November 7, 2022 (*id.* ¶¶ 22-40). Owen lived in Arizona as did Hooper, thus on May 9, 2023, plaintiff leased office space in Phoenix for Hooper and Owen to conduct plaintiff's business (*id.* ¶¶ 42-43). On November 29, 2022, plaintiff did the same in Texas for Ermisch, who resided in McKinney, Texas (*id.* ¶¶ 46-48).

Plaintiff asserts that while Hooper was in its employ, he also worked for defendant and maintained this dual employment until officially resigning his position with plaintiff on July 11, 2023 (*id.* ¶ 55). Plaintiff alleges that Hooper's actions materially breached both agreements: the Operating Agreement by secretly obtaining and commencing employment with defendant in March 2023, without plaintiff's knowledge or consent; and the Executive Agreement by, in addition to the illicit dual employment, failing to create and manage a new wholesale division for plaintiff, failing to properly manage plaintiff's retail mortgage operations; failing to promote the interests of plaintiff and render the services normally associated and incident to his position as an office of the company; and failing to devote his reasonable efforts and substantially all his productive time and attention during work hours to plaintiff in accordance with the agreement (*id.* ¶¶ 53, 57-59). Plaintiff alleges that defendant knew of Hooper's employment with plaintiff and his membership in plaintiff's company at the time of defendant hired him (*id.* ¶ 64).

Plaintiff claims that Hooper, while in his dual employment, solicited Owen and Ermisch, at defendant's request, to also work for defendant (*id.* ¶¶ 60-61). Defendant hired Owen in May 2023 and Ermisch in June 2023 (NYSCEF # 16, Deft's MOL at 2). Plaintiff informs that defendant is a Federal Savings Association, chartered by the Office of the Comptroller of the Currency of the United States (the OCC) and known as a digital Bank (Compl ¶ 4). Further, relevant to plaintiff,

defendant's business included the retail and wholesale mortgage business throughout the United States (*id.* ¶ 5).

Plaintiff initially sued defendant, Hooper, and Owen in the Superior Court of New Jersey on July 7, 2023 (NYSCEF # 11, NJ Complaint). In response, defendant Quontic filed a pre-answer motion to dismiss the New Jersey Complaint (NYSCEF #12). Rather than challenge the motion, plaintiff withdrew its claims against defendants Quontic and Owen without prejudice (NYSCEF #13, Stipulation of Dismissal). The New Jersey action continues against Hooper alone (NYSCEF # 15, Hooper's Answer). Plaintiff then initiated the present case against defendant on October 5, 2023, which defendant now moves to dismiss.

Discussion

Choice of Law

As a threshold matter, the parties do not dispute that New Jersey law applies to the tort claims (Intentional Interference, Employee Piracy, and Unfair Competition) (NYSCEF # 16 at 4-6), But they seem to disagree as to which state's law applies to the Aiding and Abetting Fiduciary Duty claim. Defendant argues that Delaware law applies (NYSCEF # 16 at 3), while plaintiff variously cites Delaware, New Jersey, and New York case law for its aiding and abetting breach of fiduciary claim. Other than that, plaintiff does not address the choice of law issue except to suggest that it is of no import since its complaint is well-pled (NYSCEF # 18, Pltf's MOL at 9). Thus, the only choice of law question is what law applies to the Aiding and Abetting Breach of Fiduciary Duty claim.

Defendant posits that because plaintiff is incorporated in Delaware, the choice of law governing "'claims concerning the relationship between the corporation [and] its directors . . .'" is Delaware law for this claim (NYSCEF # 16, Deft's MOL at 3 quoting *Ezrasons, Inc. v Rudd*, 217 AD3d 406, 406 [1st Dept 2023] [internal citations omitted]).

Defendant is mostly correct. In New York, there is a presumption that matters involving the relationships between the corporation and its officers concern the internal affairs of the corporation and the law of the state of incorporation applies (*see Eccles v Shamrock Capital Advisors, LLC*, ___ NY3d ___, 2024 NY Slip Op 02841 *7 [2024]); 2024 WL 2331737 *7). To overcome this presumption, it must be shown that "(1) the interest of the place of incorporation is minimal–i.e., that the company has virtually no contact with the place of incorporation other that the fact of its incorporation, and (2) New York has a dominant interest in applying its own substantive law" (*id.* at *10).

Here, there are two connections: Delaware is the state of plaintiff's incorporation, and the Executive Agreement between plaintiff and Hooper is

governed by the laws of Delaware (NYSCEF # 2 – Exec Agreement ¶ 15). The fiduciary duty at issue stems from the Executive Agreement. The connection to New York is that defendant has its brick and mortar loan offices in New York. (Plaintiff also has loan offices in Florida.) (Compl ¶ 4; Deft's MOL at 2). And since plaintiff's allegations are that defendant aided and abetted plaintiff's employees to breach their fiduciary duty under the Executive Agreement, which is governed by the laws of Delaware, and since the contact with New York for this tort claim is minimal, the presumption remains intact and Delaware law applies here.

Aiding and Abetting Breach of Fiduciary Duty

To state a claim for aiding and abetting breach of fiduciary duty under Delaware law, plaintiff must allege "'(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, . . . (3) knowing participation in that breach by the defendants' and (4) damages proximately caused by the breach" (*Malpiede v Townson*, 780 A2d 1075, 1096 [Sup Ct, Del [2001]).

Defendant asserts that because there has been no fiduciary duty and insufficient facts to support the "knowing participation" element of the claim, the aiding and abetting breach of fiduciary duty fails (Deft's MOL at 6). Defendant bases its assumption that there is no fiduciary duty to breach on Hooper's denial of the allegations in the New Jersey complaint (*id.* at 7). Hooper's answer to the New Jersey complaint generally denied the allegations and provided reasons for Hooper's dual employment. However, Hooper's general denial of plaintiff's allegations in the New Jersey complaint does not mean this court should not accept plaintiff's allegations in the New York complaint as true (*see Ramunno v Cawley*, 705 A2d 1029, 1034 [Sup Ct, Del [1998] ["we accept all well-pleaded allegations as true" in a motion to dismiss]). Given the provisions in both the Operating and the Executive Agreements that demand loyalty, time, and effort befitting the position of president to the benefit of the company, plaintiff's allegations of Hooper's actions to the contrary sufficiently state a cause of action for breach of fiduciary duty (*see id.*; NYSCEF # 1 ¶¶ 55-60). Further, by his dual employment, and his alleged solicitation of fellow executives at ULD to join defendant, plaintiff has sufficiently alleged that Hooper violated his fiduciary duty of loyalty to plaintiff by placing his own interests ahead of the Company's (*see Metro Storage Int'l LLC v Harron*, 275 A3d 810, 858 [Ch Ct, Del 2022] ["misuse of confidential information . . . to advance [his] personal interests and not those of" its beneficiary" is a fiduciary breach of its duty of loyalty).

The question becomes whether defendant "knowingly participated" in Hooper's breach. Plaintiff must show that defendant acted with *scienter* (*RBC Capital Markets, LLC v Jervis*, 129 A3d 816, 862 [Del 2015]). "To establish *scienter*, the plaintiff must demonstrate that the aider and abettor had 'actual or constructive knowledge that their conduct was legally improper'" (*id.*).

Defendant argues that this claim fails because plaintiff does not allege specific facts that defendant knowingly participated in Hooper's alleged breach of fiduciary duty (*id.* at 8). Defendant points out that plaintiff's only non-conclusory allegation is that defendant hired Hooper and the other employees, and the mere hiring of Hooper, Owen, and Ermisch is insufficient to show a knowing participation (*id.* at 8). Defendant claims that all the other allegations are conclusory speculation that would not permit an inference of knowing the breach of fiduciary duty (*id.* at 9).

Plaintiff, on the other hand, argues that its allegations are sufficient to allow a reasonable inference that Hooper informed defendant of his position at plaintiff that included his executive team (Pltf's MOL at 8). Plaintiff adds that for defendant, a sophisticated financial institution, not to have done a due diligence check on a candidate for a high-level executive position, "strains credulity" (*id.*). Also straining credulity is defendant's ignoring the fact that such a high-level position commanding a high-level pay would not have any agreement (*id.*). Relying on *AIG Financial Products Corp. v ICP Asset Mgmt, LLC* (108 AD3d 444, 446 [1st Dept 2013]), plaintiff is of the view that avoiding this obvious inference is to '"endorse what is essentially a 'see no evil, hear no evil' approach,' which . . . Court[s] ha[ve] refused to do." (*id.* at 9 quoting *AIG Financial Products Corp.* 108 AD3d at 446 [brackets in original]).

The alleged facts support the inference that defendant knew of Hooper's employment and contractual obligations with plaintiff when defendant hired Hooper (NYSCEF # 18 at 8). As a Federal Savings Association chartered by the OCC, defendant is a sophisticated and highly regulated financial institution that would have checked on at least the work history of any applicant let alone one who is offered a high-level executive position (*id.*). Plaintiff adds that during Hooper's hiring, defendant likely inquired about Hooper's current and past employers and became aware of his contractual duties and obligations (*id.*). Plaintiff's allegation is that defendant directed Hooper to solicit and induce Owen and Ermisch to join and work for defendant. These allegations are sufficient to show that defendant had at least constructive knowledge of Hooper's breach, and acted with scienter in hiring Hooper and the other two executives while they were working for plaintiff.

For the last prong for the aiding and abetting breach of fiduciary duty claim, plaintiff must allege that the damages to it suffered "resulted from the concerted action of the fiduciary and the non-fiduciary" (*In re Transkaryotic Therapies, Inc.*, 954 A2d 346, 373 [Ch Ct, Del 2008]). Plaintiff's allegations on the damages issue are that it suffered monetary losses in its investment of Hooper, Owen, and Ermisch. For example, plaintiff established offices in their states to carry out plaintiff's business but these employees failed to accomplish their contracted duties due to their dual employment. As a result, plaintiff lost millions of dollars in monetary damages as a result of the breach of fiduciary duties (NYSCEF # 1 ¶ 68). Plaintiff also allege that defendant, through the employees' breach of their fiduciary duty, "gutted a direct competitor' that is plaintiff (Pltf's MOL at 8 citing Compl ¶ 7 ["But

for Quontic's unlawful conduct . . . ULD would have been its direct competitor in the wholesale mortgage business"]). These allegations sufficiently show the concerted actions of defendant and the executives' alleged breach of their fiduciary duty proximately cause plaintiff to suffer financial damages.

In sum, plaintiff has the better argument on this point. Accepting plaintiff's allegations as true and reading its pleading liberally in this motion to dismiss, plaintiff has sufficiently stated a cause of action for aiding and abetting breach of fiduciary duty.

Intentional Interference with Contract, Employee Piracy and Unfair Competition[2]

Under New Jersey law, to state a claim for intentional interference with contract, the plaintiff must demonstrate: (1) a protected interest; (2) malice; (3) a reasonable likelihood that the interference caused the loss of the prospective gain; and (4) resulting damages (*Vosough v Kierce*, 437 NJ Super Ct 218, 234 [App Div 2014] [internal citations omitted]). Plaintiff easily meets the first, third, and fourth elements, but satisfying the second element, malice, is problematic.

Plaintiff has established that it has a protected interest – that is a "protected right ... a contractual relationship" (*MacDougall v Weichert*, 144 NJ 380, 404 [1996]). Defendant concedes the existence of the Executive Agreement between plaintiff and Hooper, as well as plaintiff's Operating Agreement (NYSCEF # 16 at 13-14). As to the reasonable likelihood that the interference caused the loss of prospective gain, plaintiff has alleged that as a result of the "dual employment," Hooper failed to create a new wholesale division for the plaintiff and failed to properly manage its retail mortgage operations (NYSCEF # 1 ¶¶ 57-58). This demonstrates that there is a reasonable likelihood that the interference caused the loss of a prospective gain (*Vosough*, 437 NJ Super Ct at 234). Likewise, plaintiff has alleged that it has suffered millions of dollars in damages as a result of the three executives' dual employment and failure to further plaintiff's business, which satisfies the resulting damages element.

The remaining element is malice, which is the "intentional doing of a wrongful act without justification or excuse... competition may be justification" (*Monmouth Real Est. Inv. Tr. v Manville Foodland, Inc.*, 196 NJ Super Ct 262, 270 [App Div, 1984]; *see also EZ Sockets, Inc. v Brighton-Best Socket Screw Mfg. Inc.*, 307 NJ Super 546, 559 [Ch Div, Union County 1996], *aff'd*, 307 NJ Super Ct 438 [App Div 1997] [holding that wrongful means include violence, fraud, intimidation, misrepresentation, criminal or civil threats, and/or violations of the law]). In intentional interference claims, "malicious acts are determined on a case-by-case

[2] The causes of action employee piracy and unfair competition will be addressed together as plaintiff does in its brief in opposition to defendant's motion to dismiss.

basis" (*Printing Mart-Morristown v Sharp Elecs. Corp.*, 116 NJ 739, 756 [1989]). Although the malice plaintiff alleges is imprecise, in a motion to dismiss, the complaint is accorded a liberal reading to assess whether a cause of action is 'suggested by the facts'" (*National Auto Division, LLC v Collector's Alliance, Inc.*, 2017 WL 410241 *1 [Super Ct, AD 2017]). An inference of malice can also be made through violations of the law (*see EZ Sockets, Inc.*, 307 NJ Super at 559).

It is not clear here that such an inference can be found. Plaintiff paints with a broad stroke coloring all of defendant's actions as improper and malicious in inducing and causing Hooper to also work for defendant despite defendant's knowledge of Hooper's relation with plaintiff. Plaintiff's specific argument on the "improper means" and "malicious conduct" quotes from its allegation about defendant's Consent Order with the OCC (NYSCEF # 18, Pltf's MOL at 10). But plaintiff does not explain how the OCC findings of defendant's "unsafe or unsound practices, including those relating to strategic planning and implementation, management and board oversight . . ." is an improper act or malicious conduct to plaintiff (*id.* quoting compl ¶ 8). Nor does plaintiff show how the Consent Order dictates defendant's hiring policies or practices. Thus, the Consent Order is irrelevant to whether defendant acted with malice to support plaintiff's interference with contract claim.

In any event, as defendant argues, given the undisputed fact that the parties are competitors and plaintiff's Executive Employment Agreement with Hooper is an at-will contract (NYSCEF # 2 at 2, § 3 "At will employment"), defendant's interference is not improper under New Jersey law (*see Avtec Industries, Inc. v Sony Corp. of America*, 205 NJ Super 189, 194 [1985] [internal citations omitted] ["the mere inducement of an employee to move to a competitor is not, in and of itself, actionable when the employee is terminable at will"]; *see also* Restatement (Second) of Torts section 768 [1], [2] [stating that "a competitor does not interfere improperly with another's existing contract terminable at will if (a) the relation concerns a matter involved in the competition between the actor and the other, and (b) the actor does not employ wrongful means, and (c) his action does not create or continue an unlawful restraint of trade, and (d) his purpose is at least in part to advance his interest in competing with the other"]). In that defendant allegedly induced and caused Hooper to work for defendant despite his at-will contract with plaintiff, the sense is that this is fair play for competitors. Thus, the cause of action for intentional interference with contract is dismissed.

Plaintiff's remaining causes of action are for employee piracy and unfair competition, which plaintiff claims "is eminently reasonable to infer from these allegations that Quontic's poaching of Hooper and his team was tainted not only by wrongful practices, but also with the very worst of bad faith" (Pltf's MOL at 10-11). However, plaintiff does not address these causes of actions except to mention them in its two-paragraph argument on the intentional interference with contract claim.

While piracy claims generally involve the misappropriation of trade secrets or confidential information in which plaintiff has a proprietary interest (*Fazio v Temporary Excellence, Inc.*, 2006 WL 2587625 *4 [Super Ct, Ch Div, Bergen County 2006]), and unfair competition is not a distinct cause of action but "a general rubric which subsumes various other causes of action," (*see C.R. Bard, Inc. v Wordtronics Corp.* 235 Super Ct 168, 172 [Union County 1989]) they are dismissible for lack of facts to state a cause of action. But, at bottom, claims asserting employee piracy and unfair competition in plaintiff's Point III of their brief require a showing of bad faith or malicious conduct that is considered for the intentional interference of contract cause of action. Given that the analysis is the same as that for the intentional interference with contract claim, the employee piracy and unfair competition causes of action, the employee piracy and unfair competition claims likewise fail. They are also dismissed as duplicative of the intentional interference with contract claim.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendant Quontic Bank's motion to dismiss plaintiff's complaint is granted to the extent that plaintiff's second, third, and fourth causes of action for, respectively, Intentional Interference with Contract, Employee Piracy, and Unfair Competition, are dismissed; and the motion is denied as to the first cause of action for Aiding and Abetting a Breach of Fiduciary Duty; and it is further

ORDERED that defendant Quontic Bank d/b/a Quontic Wholesale is to file an Answer within 30 days of entry of this Decision and Order; and it is further

ORDERED that plaintiff Universal Lending Depot, LLC is to serve a copy of this Decision and Order together with a notice of entry upon defendant and the Clerk of the Court within 10 days of this order.

This constitutes the Decision and Order of the court.

09/05/2024
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE